

GPS Terminal Services, Inc. and Chauffeurs, Teamsters and Helpers Local Union No. 776, a/w International Brotherhood of Teamsters, AFL-CIO, Petitioner. Case 4-RC-18840

August 27, 1998

ORDER DENYING APPEAL

BY CHAIRMAN GOULD AND MEMBERS FOX, LIEBMAN, HURTGEN, AND BRAME

The National Labor Relations Board has considered the Employer's "amended request for review" of the Regional Director's direction of a mail-ballot election.¹ The "request for review" is denied.

In denying the Employer's appeal from the Regional Director's direction of an election by mail-ballot, we find that the Regional Director did not abuse her discretion. The Regional Director's rationale for ordering a mail-ballot election is consistent with the Casehandling Manual and our recent decision in *San Diego Gas & Electric*, 325 NLRB 1143 (1998). Under the Casehandling Manual, voting may be conducted by mailballot where eligible voters are "scattered" because of their duties. In *San Diego*, we set forth guidelines clarifying the circumstances under which it is within the Regional Director's discretion to direct the use of mail-ballots. Under the guidelines, a mail-ballot election may be appropriate where employees are scattered because of their job duties in terms of geography and/or varied work schedules so that all employees cannot be present at a common place and at a common time to vote manually. Where these situations exist, the Regional Director in the exercise of discretion should also consider, inter alia, the desires of the parties and the efficient use of Board resources.

In this case, the Employer provides loading and off-loading and truck trailer repair services for railroad carriers. The Petitioner seeks to represent full-time and regular part-time packer/operators, jockeys, ground crew and mechanics employed in the Employer's Harrisburg, Pennsylvania operation. The Employer sought to include on-call employees. The Regional Director found that the appropriate unit consisted of about 30 regular and 15 on-call employees. The Regional Director found that the Employer's unit employees are scattered in the sense that their work schedules vary significantly. The Employer's 30 regularly scheduled employees typically work either a day or night-shift schedule covering the Employer's 24-hour, 7 days' a week operation. The Employer's 15 on-call employees are scheduled as work is available. The Regional Director found that because of the regular and

on-call schedules, a significant proportion of the unit employees would be unavailable at the Employer's premises for a manually conducted election absent significant alterations of the work schedules of a substantial proportion of employees.²

Having found that the employees were "scattered," the Regional Director then properly considered the parties' desires and the efficient use of Board resources. The Petitioner sought a mail-ballot election. Although the Employer opposed use of a mail-ballot election, our decision in *San Diego* required only that the Regional Director consider the positions of all the parties, not that there be unanimity for holding a mail-ballot election.

With respect to husbanding of Board resources, the Regional Director found that a manual election would incur substantial costs in Board agent time and travel expenses, including a probable overnight stay. The Employer's facility is about 105 miles (a 2-3 hour drive) from the Board's Regional Office. Under the Employer's proposal, the election either would have to begin at 9 a.m. or be held in separate sessions during the day and night shifts. In view of these factors, the Regional Director found that a manual election would not be an efficient use of limited available Board resources.³

The Regional Director's decision thus fits within the parameters of the Casehandling Manual and the guidelines set forth in *San Diego*. Accordingly, we conclude that the Regional Director acted within the discretion which she has been afforded to determine the method of conducting the election, and we deny the Employer's "amended request for review" of her determination to hold the election by mail-ballot.

CHAIRMAN GOULD concurring.

I join my colleagues in denying review of the Regional Director's decision directing a mail-ballot election. As I stated in my separate opinion in *San Diego Gas & Electric*, 325 NLRB 1143, 1144 (1998), I would find the use of mail-ballots appropriate in all situations where the prevailing conditions are such that they are necessary to conserve Agency resources and/or enfranchise employees. I agree that under the guidelines set forth in *San Diego Gas*, a mail-ballot is appropriate in the instant case. I would, however, also find the Regional Director's reliance on the Agency's budgetary constraints is a sufficient basis for directing a mail-ballot election. See *San Diego Gas*, supra; *Diamond Walnut Growers*, 326 NLRB No. 4, slip op. at 3-4 (1998); *London's Farm Dairy*, 323 NLRB 1057, 1058 (1997); and *Willamette*

¹ Although the document filed by the Employer is entitled a request for review, we have treated it as a request for special permission to appeal the Regional Director's direction of a mail-ballot election, since that determination was not contained in the Decision and Direction of Election. Pertinent portions of the Regional Director's letter setting forth her reasons for directing a mail-ballot election are attached as an appendix.

² In *San Diego*, we specifically suggested consideration of a mail-ballot where a significant number of eligible voters work on an on-call basis.

³ In view of the foregoing, we find it unnecessary to rely on the Regional Director's additional finding that a mail-ballot is the most effective means by which to provide the six alleged discriminatees with an opportunity to vote.

Industries, 322 NLRB 856 (1997) (W. Gould concurring).

My dissenting colleagues rely on the Employer's offer to call all employees to work on a single shift or a single day. As I stated in *London's Farm Dairy*, supra, although the Employer's offer to change employees' schedules is not improper, the message sent to employees is that their ability to vote is predicated on a different work schedule over which they have no control. The unilateral change of any aspect of the work relationship which is within the employer's absolute control cannot be a prerequisite to employee access to the Board's electoral process. In my view, employee free choice is not best realized under such circumstances. My dissenting colleagues also state that the Union bears the burden of proof as the party seeking "an exception to the norm of a manual ballot." I do not subscribe to this view. It is undisputed that the Regional Director has the discretion to determine the election procedure, whether manual or mail-ballot. Once the election procedure has been set, the party seeking to alter that procedure has the burden of demonstrating that the Regional Director abused her discretion. See *Odebrecht Contractors of Florida*, 326 NLRB No. 8 slip op. at 2 (1998) (W. Gould concurring). In the instant case, the Employer has failed to meet this burden.

MEMBER HURTGEN AND MEMBER BRAME, dissenting.

For the reasons stated in our dissent in *San Diego Gas & Electric*, 325 NLRB 1143 (1098), we would reverse the Regional Director's direction of a mail-ballot election. In our view, a traditional manual election is not infeasible. The Employer has offered to call all employees to work on a single shift, or to call them on a single day (two shifts). A Board agent could easily travel the 105 miles to the election, incurring at most a single overnight stay. These circumstances make a manual election far from infeasible.

The Regional Director found that unit employees were scattered by schedule/shift and by on-call status. She asserted that some employees would "possibly" be inconvenienced by the change offered by the Employer. Of course, for those employees who would normally be working on the shift during which the election is held, there is no change at all. As to those who would be changed to a different shift, there is no evidence of inconvenience. The Union, as the party seeking an exception to the norm of a manual ballot, has the burden of proof. There is no such proof.

Further, as to the "on-call" employees, such employees are always subject to the Employer's call. Thus, the Employer's calling them in during an election period is not a change in their "on-call" conditions.

Finally, the concurring opinion asserts that the Employer's offer to make a change in the work schedule sends a message to employees that they do not control

the work schedule. The concurring opinion concedes that the Employer's offer is not improper. Indeed, it should be obvious to all that *the Employer* controls the work schedule. No message is needed for that. Where, as here, the Employer offers to change the work schedule, so as to facilitate the voting process, the message sent is that the Employer is accommodating the Board and the rights of the employees. Indeed it is fanciful to view such a scheduling change as an effort of the employer to demonstrate control. We agree with the Chairman that employer control cannot be used so as to deny "employee access to the Board's electoral machinery." However, the control here was exercised to *facilitate* access to such machinery.

Accordingly, we would conduct a manual election.

APPENDIX

The voting unit in this case consists of all full-time and regular part-time packer operators, jockeys, ground crew, mechanics, and production clerks employed by the Employer at its Harrisburg, Pennsylvania facility. The Employer advises that the voting unit consists of approximately 30 regularly scheduled employees and 15 "on-call" employees. The Employer operates 24 hours a day and 7 days a week, and the regularly scheduled employees typically work either a day or night shift schedule. On-call employees are scheduled to work whenever work is available. The Employer's facility is approximately 105 miles from the Regional Office, and the driving time to the Employer's facility from the Regional Office is 2 to 3 hours.

The Employer acknowledges that the significant percentage of on-call employees, many of whom would not be scheduled to work on any given day, represents a significant problem in conducting a meaningful manual representation election. Nonetheless, the Employer requests that a manual ballot election be conducted and has offered two proposals which it asserts would facilitate the conduct of such an election. Under the first proposal, the Employer would direct all employees to work a day shift on the date of the election and conducting the election from 9 to 11 a.m. In this scenario, the Employer would both reschedule the night shift employees to the day shift and schedule all on-call employees to work on the day of the election. The Employer's second proposal would be to schedule a split shift election with separate 1-hour voting sessions for the day shift and the night shift employees, while the Employer would direct all on-call employees to work during the hours of the election.

The Union requests that the voting be conducted by mail-ballot. The Union particularly objects to any procedure which would depend on revising the schedules of a significant number of employees in order to facilitate a manual election. The Union also asserts that a manual election would make voting difficult, or even impossible, for individuals alleged to be discriminatees in the concurrent unfair labor practice charge filed by the Union in Case 4-CA-24834. The Union notes that these individuals are not currently employed by the Employer, they may have employment or personal obligations which could preclude them from voting in a manual election.

Both of the Employer's proposals would require in alterations of the work schedules of a substantial proportion of employees, possibly inconveniencing them. In addition, because of the travel distance and the timing of the start of the election, the

Agency would incur substantial costs in Board agent time and travel expenses, including a probable overnight stay. Because of our limited resources, the National Labor Relations Board must carefully limit expenditures and conserve budgetary resources whenever possible.

In view of the foregoing, it is not prudent or efficient to have a Board agent conduct a manual election in this matter. See *Reynolds Wheels International*, 323 NLRB 1062 (1997). Furthermore, it is not advisable to conduct a manual ballot election in a circumstance which would require an alteration in a sub-

stantial percentage of employees' schedules and may potentially affect their views of the election process or interfere with their other personal responsibilities. *London's Farm Dairy*, 323 NLRB 1057 (1997). Finally, giving consideration to the alleged discriminatees who may chose to cast ballots, a mail-ballot is the most effective means by which to provide them with an opportunity to vote. Accordingly, I am directing a mail-ballot election in this matter.